

FEDERAL MAGISTRATES COURT OF AUSTRALIA

TRUONG v MINISTER FOR IMMIGRATION [2005] FMCA 479

MIGRATION – Migration Review Tribunal – spouse visa – whether jurisdictional error – genuine and continuing relationship – whether wrong test applied.

Judiciary Act 1903 (Cth), s.39
Migration Act 1958 (Cth), ss.65, 359

VAT v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCAFC 255

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

MIMIA v Eshetu (1999) 197 CLR 611

Re MIMIA; Ex parte Applicants S134/2002 (2002) 195 ALR 1 (4 February 2003)

Scargill v Minister for Immigration & Multicultural Affairs (2003) FCAFC 116, 75 ALD 53

Elbrow v MIMIA (2004) FCA 595 (14 May 2004)

SDAV v MIMIA (2003) 199 ALR 43

Carlos v Minister for Immigration & Multicultural Affairs (2001) 183 CLR 719

Applicant: MY HIEM TRUONG

Respondent: MINISTER FOR IMMIGRATION &
MULTICULTURAL & INDIGENOUS
AFFAIRS

File Number: MLG1490 of 2003

Judgment of: McInnis FM

Hearing date: 22 December 2004

Delivered at: Melbourne

Delivered on: 15 April 2005

REPRESENTATION

Counsel for the Applicant:	Mr M Gerkens
Solicitors for the Applicant:	Lily Ong
Counsel for the Respondent:	Mr Gilbert
Solicitors for the Respondent:	Blake Dawson Waldron

ORDERS

- (1) The Application be dismissed.
- (2) The Applicant shall pay the Respondent's costs fixed in the sum of \$5,600.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MLG1490 of 2003

MY HIEM TRUONG
Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIEGNOUS AFFAIRS**
Respondent

REASONS FOR JUDGMENT

1. In this matter the Applicant seeks review under s.39B of the *Judiciary Act 1903* (Cth) (the Judiciary Act) and the *Migration Act 1958* (Cth) (the Migration Act) of a decision of the Migration Review Tribunal (the MRT). The MRT decision dated 28 August 2003 had affirmed a decision of a delegate of the Respondent dated 23 October 2002 refusing to grant to the Applicant a Spouse (Migrant) (Class BC) subclass 100 (spouse) visa.
2. The Applicant who is represented has relied upon an amended application filed on 30 July 2004 though in that application has not pursued all the grounds set out and specifically does not pursue grounds 2 and 6 in that document. The remaining grounds relied upon are as follows:-

“1. The Tribunal proceeded upon an incorrect understanding or construction of the Migration Regulations (the Regulations) and the visa criteria to be satisfied thereunder.

3. Particulars

4. (i) it stated the issue and the test for the grant of the spouse (migrant) (class BC) subclass 100 (spouse) visa to be that the visa applicant continue to be 'spouse' of the nominator as at the date of decision. This is a misconstruction of or an impermissible gloss on the criteria which must be satisfied;
5. (ii) in making a finding that the applicant was in a spousal relationship with the nominator as at the time of the application, and, implicitly that she had been but had ceased to be at the time of decision, the tribunal was diverted from the question whether she was in a married relationship at the time of the decision. Again, this involved a misconstruction of or an impermissible gloss on the criteria which must be satisfied
6. ...
7. 3. The Tribunal failed to take relevant considerations into account.

8. Particulars

9. The Tribunal failed to take account of the applicant's claimed cumulatively.
10. 4. The Tribunal failed to comply with the requirements of s.359A of the Act.

11. Particulars

12. In the internal migration review briefing paper of 1 July 2003 the case officer compiled information for the Tribunal which was later used by the Tribunal as reasons or some of the reasons for affirming the decision under review. The Tribunal failed to give particulars of the information pursuant to s.359A.

5. *Failure by the Tribunal to accord the Applicant procedural fairness in relation to the hearing on 18 August 2003.*

13. *Particulars*

14. *In the internal migration review briefing paper of 1 July 2003 the case officer compiled information for the Tribunal which was later used by the Tribunal as reasons or some of the reasons for affirming the decision under review. The Tribunal failed to give particulars of the information pursuant to s.359A.”*

Background facts

15. The background facts are not disputed in this matter. The Applicant who is a National of Vietnam married a Mr Phuong Dong Ngo in Vietnam on 25 May 1998. The parties met in Vietnam when he was on a visit to that country. Mr Ngo is an Australian citizen who was born in Vietnam. The Applicant applied for the spouse visa on 30 June 1999. Mr Ngo was the nominator or sponsoring spouse. The visa was granted on 25 May 2000. The Applicant came to Australia on 23 June 2000 to take up residence with her husband. Following the usual practice with a provisional visa the Applicant was considered for a permanent subclass 100 visa after a period of approximately two years. On 23 October 2002 a delegate of the respondent refused to grant the subclass 100 visa. The principle basis for refusal was that the Applicant had failed to respond to two requests from the delegate for further information. The Applicant applied to the MRT for review of this decision stating amongst other things that a relative had failed to pass on the delegate's letters to her. The Applicant attended a hearing of the MRT on 18 August 2003. The MRT heard evidence from the Applicant, the nominator and a person who was living with them in the same house. The Applicant and nominator maintained that they were in a genuine spousal relationship at the time of the decision.

Relevant legislation

16. The statutory criteria for the granting of the subclass 100 visa are found in Schedule 2 of the *Migration Regulations 1994* (the regulations). It is

noted that there are no time of application criteria for this visa. The relevant time of decision criteria are found in clause 100.22 which provides as follows:

“101.22 Criteria to be satisfied at time of decision

101.221 (1) The applicant meets the requirements of subclause (2), (3) or (4) or (4A).

(2) The applicant meets the requirements of this clause if:

(a) the applicant is a holder of a Subclass 309 (Spouse (Provisional)) visa; and

(b) the applicant is the spouse of the sponsoring spouse; and

(c) subject to subclauses (5), (6) and (7), at least 2 years have passed since the application was made.”

17. In the present application it is conceded met clause 100.221(2)(a) and (c) as she was the holder of a subclass 309 visa and at least two years had passed since her application. The significant issue is whether the Applicant was the spouse of the sponsoring spouse as required by clause 100.221(1)(b). The term ‘spouse’ is defined in regulation 1.15A of the regulations which relevantly provides as follows:-

“(1) For the purposes of these Regulations, a person is the spouse of another person if the 2 persons are:

(a) in a married relationship, as described in subregulation (1A); or

(b) in a de facto relationship, as described in subregulation (2).

(1A) Persons are in a married relationship if:

(a) they are married to each other under a marriage that is recognised as valid for the purposes of the Act; and

(b) the Minister is satisfied that:

- (i) *they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- (ii) *the relationship between them is genuine and continuing; and*
- (iii) *they:*
 - (A) *live together; or*
 - (B) *do not live separately and apart on a permanent basis.*

18. ...

- (3) *In forming an opinion whether 2 persons are in a married relationship, or a de facto relationship, in relation to an application for*

...

- (ad) *a Spouse (Migrant) (Class BC) visa; or*

...

the Minister must have regard to all of the circumstances of the relationship, including, in particular:

- (a) *the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the extent of any pooling of financial resources, especially in relation to major financial commitments; and*
- (b) *the nature of the household, including:*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties' living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including:*

- (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
- (ii) *the opinion of the persons' friends and acquaintances about the nature of the relationship; and*
- (iii) *any basis on which the persons plan and undertake joint social activities;*
- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time during which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one."*

19. It is also relevant to set out Regulation 1.15A(5) which provides as follows:-

- "(5) *If 2 persons have been living together at the same address for 6 months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing, but a relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason."*

Jurisdictional error

20. In considering the issue of jurisdictional error I adopt and apply the following passage from the Full Court of the Federal Court decision in *VAT v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCAFC 255 where the Court states:-

- "16 *It is not disputed by the appellants that in order to find jurisdictional error this Court should rely on the description of what constitutes jurisdictional error as it appears in Plaintiff S157/2002 v Commonwealth of Australia [2003]*

HCA 2; (2003) 211 CLR 476 and in particular on the statement in Minister for Immigration & Multicultural Affairs v Yusuf [2001] HCA 30; (2001) 206 CLR 323 at [82] citing Craig v State of South Australia (1995) 184 CLR 163. That requires the appellants to establish that the Tribunal fell into error of law by identifying a wrong issue, asking itself a wrong question, ignoring relevant material, relying on irrelevant material or, at least in some circumstances, making an erroneous finding or reaching a mistaken conclusion. To this may be added denial of procedural fairness: Minister for Immigration & Multicultural & Indigenous Affairs v SGLB [2004] HCA 32; (2004) 207 ALR 12 per Gummow and Hayne JJ at [49], footnote 26 referring to Re Refugee Review Tribunal; Ex parte Aala [2000] HCA 57; (2000) 204 CLR 82 and Re Minister for Immigration & Multicultural Affairs; Ex parte Miah [2001] HCA 22; (2001) 206 CLR 57.”

21. Any jurisdictional error detected must of course affect the exercise or purported exercise of power in order to provide a proper basis upon which the Court should intervene by way of judicial review. A failure to take into account a relevant consideration would not of itself constitute an error unless it was a consideration that the MRT was bound to take into account (see *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24).

Grounds

Ground 1 – The Tribunal proceeded upon an incorrect understanding or construction of the Migration Regulations (the Regulations) and the visa criteria to be satisfied thereunder

Applicant’s submissions

22. The Applicant referred to s.65 of the *Migration Act 1958* which provides that after considering a valid application for a visa, the Respondent must grant the visa if she is satisfied (inter alia) that the relevant criteria prescribed by the Act or the regulations have been satisfied and must refuse to grant the visa if she is not so satisfied. It is argued that the section contains no element of discretion.

23. Reference was made to the decision of the High Court in *MIMIA v Eshetu* (1999) 197 CLR 611 at 647 where the Court states the following:-

“... It will be noted that s 65(1) imposed upon the Minister an obligation to grant or to refuse to grant a visa, rather than a power to be exercised at discretion. The Minister’s satisfaction was an anterior matter, being a component of the condition precedent to the discharge of the obligation to grant or refuse the visa.”

24. It is argued that that view expressed by Gummow J was confirmed by the High Court in the matter of *Re MIMIA; Ex parte Applicants S134/2002* (2002) 195 ALR 1 (4 February 2003) per Gaudron and Kirby JJ at 19 who concluded:-

“[83] In light of the detailed specification in the regulations of the criteria for the grant of various classes of visa, it is impossible to treat the consideration by the decision-maker of the relevant criteria and his or her satisfaction or lack of satisfaction in that regard as other than conditions precedent to a valid decision to grant or refuse a visa under s 65(1) of the Act.”

25. Further reference was made by the Applicant to the approach being followed by the Full Court of the Federal Court in *Scargill v Minister for Immigration & Multicultural Affairs* (2003) FCAFC 116, 75 ALD 53 where the Court states the following at paragraphs 31 and 34:-

“[31] In our opinion in determining whether the appellant met the criteria prescribed in subclass 806 it was necessary for the tribunal to take into account the appellant’s presence in Australia, at least from the time when he made his application for the visa. The failure to do so has the consequence in this case that the tribunal failed to fulfil the task that was required of it under s 65(1) of the Act. IT failed to decide according to law whether it was satisfied that the criteria prescribed by the regulations had been satisfied.

...

Does s 474(1) protect the tribunal’s decision from review?

[34] *The remaining question is whether the error on the part of the tribunal, which constituted a failure to correctly address the prescribed criteria for the visa for which application was made, constitutes an error which is not protected from review under s 474(1) of the Act. Such a decision will not be protected as a privative clause if it is not one made ‘under this Act’: s 474(2).”*

26. It is argued that in the *Scargill* decision it was held that misconstruction or misapplication of a prescribed visa criteria will result in jurisdictional error.
27. The Applicant’s key submission was that a jurisdictional error was evidenced in the MRT’s consideration of the test applicable to the grant of a Spouse (Migrant) (Class BC) subclass 100 (spouse) visa. In considering that submission it is relevant to refer to extracts from the MRT decision referred to during the course of the Applicant’s and Respondent’s submissions as follows:-

“32. *The criteria for a subclass 100 visa, relevant to this review, are set out in subclause 100.221. There is no time of application criteria to be satisfied by virtue of the requirement that the visa applicant has already been assessed for and granted a subclass 309 visa. It is required that the visa applicant continue to be the spouse of the nominator and that the visa applicant continues to be nominated by the nominating spouse and that the parties to the spousal relationship have not changed.*

...

37. *The Tribunal finds:*

- *The visa applicant was in a spousal relationship with the nominator at the time of the visa application, however the Tribunal finds that the visa applicant does not continue to be the spouse of the nominator.*
- *The nominator was and is now an Australian citizen, and the nomination is approved.”*

28. It was submitted that the MRT clearly understood the regulations to mean that there had to be a continuation of status as a spouse from the time of the original application until the time of the tribunal’s decision. During the course of submissions the Applicant’s Counsel, Mr Gerken

submitted that the visa criteria under the heading ‘100.22’ refers to “criteria to be satisfied at time of decision” and hence that must be the point in time. It was argued that at the time of the decision the test is whether at that point in time the Applicant is the spouse of the nominating husband and not the case of having had to be the spouse throughout the period of time from the time of application. Issues were raised as to predicting the likelihood of a relationship being one which is both genuine and continuing and Counsel appeared to concede that if at the date of the decision the relationship is genuine then at best the continuing part of the test ‘appears to be continuing’ at the date of the decision. It was submitted that the issue for the MRT is to determine at the time of the decision whether or not it is a genuine and continuing relationship. Reliance was placed upon the words in the criteria which provide that “the Applicant **is** the spouse or the sponsoring spouse” (emphasis added) which it was argued “is at the time of the decision”.

29. It was accordingly argued by reference to the MRT decision that it had misconceived the test in that it embarked upon a fact finding mission dealing with the issue of whether there had been any break in the relationship during the two year period.
30. Specific reference was made to the MRT decision in paragraph 32 referred to above and in particular the sentence which provides, “*It is required that the visa applicant continue to be the spouse of the nominator and that the visa applicant continues to be nominated by the nominating spouse and that the parties to the spousal relationship have not changed*”. Reference was made in paragraph 35 of the MRT decision where the MRT states, “*Having regard to the considerations for a spousal relationship set out in Regulation 1.15A at the time of application and at the time of decision ...*” and in the same paragraph further states, “*The visa applicant arrived in Australia 3 years ago, however no independent evidence has been provided that they have lived together or maintained their relationship for the duration of her residence in Australia*”. Further reference is made to the sentence under paragraph 35 of the MRT decision where it states, “There is little independent evidence that the relationship has continued for the duration of the visa applicant’s stay in Australia or continues today”.

31. It was submitted that the conception that the test is the duration of the Applicant's stay in Australia is made clear in those extracts and further the conclusion recited earlier in this decision in paragraph 37. It was conceded that if reference were not made to the evidence being provided that the parties had lived together or maintained their relationship "for the duration of her residence in Australia" but simply relied upon lack of evidence that the relationship was a genuine and continuing one as at the date of decision then perhaps there would be no jurisdictional error or misapplication of the appropriate test. In support of the Applicant's submissions reference was made to the decision of the Federal Court in *Elbrow v MIMIA* (2004) FCA 595 (14 May 2004) and in particular the following passage from the judgment of Spender J:-

"23. ... *Quite simply, the Tribunal applied the wrong test in the task of determining whether the applicant satisfied the criterion in subcl 832.212(4)(c), and if it had applied the right test, it ought to have concluded that the applicant satisfied that criterion.*"

32. Further reliance was placed upon the Full Court of the Federal Court decision in *SDAV v MIMIA* (2003) 199 ALR 43 where the Court states at paragraph 38 the following:-

"[38] ... *Thus, it is essential to establish something more than an error of law within jurisdiction. Difficult as it may be sometimes to differentiate jurisdictional and non-jurisdictional error with exactitude, in a case where there has been a fundamental mistake at the threshold in expressing and therefore considering, the legal claim propounded by an applicant, the error will be classified as an error of jurisdiction. It will be treated as a constructive failure of the decision-maker to exercise the jurisdiction and powers given to it.*"

33. It was accordingly submitted by Mr Gerkens for the Applicant that in the present case the MRT has taken into account considerations which are irrelevant to the actual criterion set out in clause 100.221(2)(b) and has therefore made a jurisdictional error.

Respondent's submissions

34. It was submitted on behalf of the Respondent that the MRT had used the expression “continue” or “continues” on a number of occasions. Again, reference was made to the extracts from paragraphs 32 and 37. It was argued that as the Applicant’s contentions imply a relationship need not be continuing from the date of an application to the date of decision and for example the relationship may break down in the intervening period however it may have resumed to the satisfaction of the decision-maker at the time of the decision.
35. It is submitted however that on a fair reading of the MRT decision it was not imposing a “continuing requirement”. The MRT was aware that it was considering the time of decision criterion and in particular that the Applicant had to be spouse of the sponsoring spouse (see subclause 100.221(2)(b)). Any use by the MRT of the word “continue” should be seen in the context of the definition of the term “spouse” which requires that the parties are in a relationship that is *genuine* and *continuing* (see Regulation 1.15A(1A)(2)(b)(ii). It was argued that the MRT must decide amongst other things whether the Applicant is in a “continuing relationship” as at the time of decision.
36. A proper reading of its reasons indicates that it had undertaken the task correctly and had correctly set out the task at hand. It did this in paragraph 36 of its decision where it states the following:-
- “36. *Had Tribunal been making a decision with respect to the relationship at the date of application, it may well have come to a different conclusion from that of the delegate. That matter however has been decided and it is the function of this Tribunal, to decide whether or not the temporary spousal visa which was granted pursuant to Regulation 309 should, over 2 years later, be made permanent pursuant to Regulation 100.*”
37. The Applicant having been granted a temporary subclass 309 visa combined with the fact that two years had passed meant that the MRT was addressing whether the time for decision criteria for permanent subclass 100 visa were met. It was not diverted by its task from any misconception and accordingly Ground 1 should fail.

38. Quite properly Mr Gilbert for the Respondent accepted the MRT had used the words “continue” or “continuing”. It is noted that the language of the relevant subclause refers to the present tense and in particular reference was made to subclause 100.221(2)(b) where reference is made to the Applicant “is the spouse of the sponsoring spouse”. However, it was submitted that reference to spouse must include consideration of the definition of spouse set out earlier in this judgment which includes an assessment by the Minister that amongst other things that the relationship between the parties “is genuine and continuing”. In the present case it was argued this is not a matter where there was evidence that the parties had what might be described as “on again off again relationship”. The parties had argued they had a genuine relationship as at the grant of the section 309 visa and were still in one at the time of application. Had there been significant periods of break down of the relationship during the intervening two year period then it is argued that that may well have been relevant for the MRT. The use however by the MRT of the word “continue” or “continues” whilst taken in strict isolation may not be correct, it was argued that it is effectively “quibbling with the language” of the MRT or looking at the decision with what is described in the authorities as an eye finely attuned to the perception of error.
39. Although the MRT is required to make a decision at the time of the decision, it was argued this is not a task undertaken in what might be described as a “complete vacuum”. It has before it at least a two year history and in a sense cannot ignore the intervening time as the determination of whether a relationship is genuine and continuing must involve analysis of what occurred in the intervening period and it is noted in the present application there was no suggestion that there had been any separation. The task of the tribunal involves looking at the past history and the present and perhaps to some extent looking at the future albeit simply having regard to the nature of the commitment of the parties to each other. For example plans to have children, whether the parties planned to purchase a house or other long term plans. Those matters can be relevant in assessing whether the relationship between them is genuine and continuing. As I understand the submissions by Counsel for the Respondent it was conceded that it is not necessary for the relationship to have continued in the two year period prior to the time of the decision.

40. It was submitted that reference to the tribunal in this decision at paragraph 35 to the finding that there is “little independent evidence that the relationship has continued for the duration of the visa applicant’s stay in Australia or continues today” was not seeking to set out a specific test but rather an observation of the state of evidence before the MRT. The MRT is doing no more than examining the factual matrix as part of its decision making process. It deals with issues such as the level of commitment of the parties to each other as opposed to simply running a business from common premises at which they reside. It is perhaps useful to set out the following passage from the MRT decision:-

“Whether the persons live together, or do not live separately and apart on a permanent basis

Very little independent evidence has been submitted to confirm that the parties live together as a committed couple, as opposed to running a business from common premises at which they reside. The evidence indicates that they live with other people but does not in the Tribunal’s view, indicate anything further. The evidence relating to the nature of the household and respective roles which the parties undertake was not, in the Tribunal’s view, indicative of a committed relationship. It is equally consistent with a relationship of convenience. The parties socialise very little considering that the visa applicant has been in Australia for approximately three years. The evidence indicates that they effectively socialise with one friend of the nominator who is also involved with him in business.”

41. The Respondent submitted that whether or not this Court would have come to a similar conclusion is obviously not relevant in consideration of an application of this kind.

Reasoning

42. In my view whilst there has been an unfortunate use of the language by the MRT which may at least lead to a suggestion that it introduced an inappropriate test and/or misconceived the test which should be applied, I accept the Respondent’s submissions that to draw that conclusion would be in the circumstances to adopt an unduly technical analysis of the MRT decision. Despite the very thorough and forceful submissions by Counsel for the Applicant I am not persuaded that there

has been jurisdictional error or application of the wrong test. The MRT has as indicated by the Respondent set out the correct test though in its fact finding process it has considered the totality of the evidence which perhaps understandably includes consideration of the circumstances at the time of decision correctly, though by inference the past circumstances and perhaps future. I do not see however in the fact finding process any jurisdictional error as it would be artificial and in my view unduly technical to interpret that fact finding process as providing a proper basis as argued by the Applicant to establish jurisdictional error. I reject the Applicant's submissions. In assessing whether the relationship is genuine and continuing, it is my view that the MRT was entitled to approach its task in the manner set out in the extracts referred to earlier in this judgment. The circumstances may be different if as a result of short separations during the two year period some adverse inference was drawn against the Applicant without further analysis of other evidence and material readily available to the MRT. That is not the case in the present application. Accordingly in my view Ground 1 fails.

Ground 3 – The Tribunal failed to take relevant considerations into account

Applicant's submissions

43. The Applicant relied upon the *Elbrow* decision and in particular paragraph 23 set out above. It was argued the MRT should consider the Applicant's claim cumulatively as well as individually and reference was made to the Procedure Advice Manual 3 policy guidelines in relation to the interpretation of Regulation 1.15A. It was argued that whilst the MRT had considered the evidence in the light of specific circumstances under 1.15A(3) including the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons commitment to each other, it had failed having made separate findings in relation to that matter to consider the issue cumulatively.

Respondent's submissions

44. The Respondent submitted that reliance upon the *Elbrow* decision was misplaced. In any event the MRT in the present case did consider the totality of the claim and all the circumstances of the relationship. The MRT it was submitted is not required in deciding the matter to repeat verbatim the words in the Procedure Advice Manual.

Reasoning

45. In my view the Respondent's submissions in relation to this issue are correct. Whilst it is true that the MRT has considered each and every one of the items separately, it has ultimately reached an overall decision based upon those individual findings which taken together would lead it to a conclusion reasonably open on the evidence. It would be imposing too high a duty on the MRT to require it to recite verbatim the policy guidelines set out in the Procedure Advice Manual and in matters of this kind I do not accept that there is a requirement that it should specifically state that it has considered the individual items cumulatively. I do not regard its reasoning as providing a basis for jurisdictional error and accordingly Ground 3 fail.

Ground 4 – The Tribunal failed to comply with the requirements of s.359A of the Act

Applicant's submissions

46. It is submitted that it has now established a failure by the MRT to comply with its obligations under s.359A of the Migration Act that constitute jurisdictional error (see *Carlos v Minister for Immigration & Multicultural Affairs* (2001) 183 CLR 719 (Carlos)).
47. Section 359A provides as follows:-

“(1) Subject to subsection (2), the Tribunal must:

- (a) give to the applicant, in the way that the Tribunal considers appropriate in the circumstances, particulars of any information that the Tribunal considers would be the reason, or a part of the

reason, for affirming the decision that is under review; and

(b) ensure, as far as is reasonably practicable, that the applicant understands why it is relevant to the review; and

(c) invite the applicant to comment on it.

(2) The information and invitation must be given to the applicant:

(a) except where paragraph (b) applies—by one of the methods specified in section 379A; or

(b) if the applicant is in immigration detention—by a method prescribed for the purposes of giving documents to such a person.

(4) This section does not apply to information:

(a) that is not specifically about the applicant or another person and is just about a class of persons of which the applicant or other person is a member; or

(b) that the applicant gave for the purpose of the application; or

(c) that is non-disclosable information.”

48. It was argued that the MRT decision on a proper analysis clearly involved a rejection of the evidence of the Applicant and her witness that the marriage was genuine and a case officer of the Department had prepared a minute on 1 July 2003 seeking comment by the Applicant on certain matters relating to the review pursuant to s.359A of the Migration Act. Specifically it is noted that the minute provides the following:-

“(ii) Under s.359A invite her to comment on the fact that the address on the nominator’s driver’s licence is the same as the one given by her at the departmental interview as that of her ‘cousin’. This is relevant ... in relation to the issue of cohabitation.” (See Supplementary Court Book p.1)

49. That invitation to comment was referred to in correspondence from the MRT to the Applicant dated 4 July 2003 (CB p 81) where in part the

letter states, *“You submitted a copy of Mr Ngo’s driver’s licence to the tribunal which shows his address as 277 Dalton Road Lalor. At the interview with the delegate in Vietnam prior to the grant of your temporary visa you were asked the address of Tran Huong Phung who you claimed introduced you to Mr Ngo. You stated that she lived at the same address at that on Mr Ngo’s driver’s licence.”* Correspondence was received from the Applicant’s then migration agent by the MRT on 11 August 2003 explaining the use of the address and at the hearing, direct reference was made to the issues specified in the s.359A notice. Reference was made to transcript of proceedings on 18 August 2003. It was noted that there was no reference made to other items referred to in the minute dated 1 July 2003 which had been crossed out. I do not regard that as of any relevance or significance.

50. After analysing the transcript however it was contended that the exchange reveals that if an applicant’s application was not going to be decided on the basis of the matters referred to in the correspondence, then those matters to which the decision should relate should have been put to the Applicant instead. The matters in the internal MRT briefing papers and MRT minutes should have been put to the Applicant, it was claimed, before the hearing. Failure to do so constituted a failure to discharge obligations under s.359A.

Respondent’s submissions

51. It was submitted by the Respondent the material contained in the document in question is not information for the purpose of 359A(1)(a). A similar issue it was argued was raised in the *Carlos* decision where the tribunal had requested advice from a colleague within the tribunal on the proper interpretation of a particular regulation in question. The tribunal repeated much of the advice in its decision and the Full Court contrary to the decision of the primary judge that there was no breach of 359A. It considered the colleague had not provided any new information to the tribunal member but rather was offering his own views on the interpretation and akin to a lawyer was reciting his instructions and then commenting on the resultant legal situation. It is noted that the Court in *Carlos* stated at p.463 paragraph 29 the following:-

“The critical issue in relation to s.359A(1) is not the origin of the communication to the Tribunal member but its nature. For example, if another member of the Tribunal, or a Tribunal officer, gave to the member hearing a particular piece of factual information about an applicant that was potentially prejudicial to the applicant’s case, s.359A would oblige the Tribunal member to disclose that information to the applicant and invite the applicant to comment about it. That is an understandable result. The factual information is new material, not given to the Tribunal member by the applicant or previously raised. In terms of procedural fairness, it can make no difference, whether its source is within the Tribunal or outside. The applicant is entitled to know about the factual information and to deal with it.”

52. The analysis in that case applies to the present case and the case officer was not giving the tribunal any new information but simply setting out some of the existing factual information from the Applicant’s file and making preliminary non-binding observations about the adequacy of the material then existing. This was an administrative task. In any event the Applicant must have known that in the present case appropriate evidence would need to be given to satisfy the requirements of sub regulation 1.15A(3). During the course of the hearing the MRT raised a number of matters with the Applicant and nominator where witnesses were given the opportunity to say anything in support of the application. Any comments by a case officer did not trigger any obligation under s.359A and there is no jurisdictional error.

Reasoning

53. In my view the Respondent’s submissions in relation to this issue are correct. In applying the decision of the Court in *Carlos* I am satisfied in the present case that the material that I have examined could not be material which could be regarded as information for the purposes of s.359A(1)(a). I am satisfied that the material merely provides an indicator of issues which may be raised and otherwise recites indeed criteria which must be complied with in order to satisfy the matters raised in sub regulation 1.15A(3). There is no error of law as the documents do not constitute information for the purposes of s.359A(1) (a) of the Migration Act. Accordingly no obligation arose in relation to these documents and there is no jurisdictional error. Ground 4 must fail.

Ground 5 – Failure by the Tribunal to accord the Applicant procedural fairness in relation to the hearing on 18 August 2003

54. This ground essentially seeks to rely upon failure to comply with the requirements of s.359A of the Migration Act and for the reasons given earlier I am satisfied that the case officer's documents does not give rise to an obligation under that section and I am otherwise satisfied and accept the Respondent's submissions that there is no basis upon which this Court could find there has been a breach of rules of procedural fairness. Ground 5 should fail.

Conclusion

55. It follows for the reasons given that the application should be dismissed with costs.

I certify that the preceding forty-one (41) paragraphs are a true copy of the reasons for judgment of McInnis FM

Associate:

Date: 15 April 2005